amicus curiae, this case presents an issue whether the "plain statement" rule of Harris v. Reed, 489 U.S. 255 (1989), and Michigan v. Long, 463 U.S. 1032 (1983), governs the determination whether a state procedural bar has been regularly and evenhandedly applied, rather than simply the determination whether it was applied in the case sub judice.

Amicus curiae is wrong; there is no such issue in this case. Morales did not rely on Harris v. Reed, 489 U.S. 255 (1989) or any other presumption in connection with his showing regarding the uneven application of the state-court's timeliness policies.[3] His showing was based on a detailed empirical review of the actual practice of the California Supreme Court, a review which in no way validates amicus curiae's "common sense" view that the California Supreme Court simply chooses not to consider a difficult procedural issue when a claim clearly is without merit. It is clear from even a cursory review of the California Supreme Court's habeas corpus procedures that the state court takes the federal court consequences of its actions very seriously, particularly with respect to the adequate and

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[3] Reliance on Harris v. Reed, 489 U.S. 255 (1989) would have been particularly inappropriate since many of the orders involved herein are largely unexplained denials. See Ylst v. Nunnemaker, 501 U.S. 797 (1991).

independent state ground doctrine. Thus, the court frequently includes language in its "post-card" denials signally its intent to have a procedural basis for decision treated as an adequate and independent state ground within the meaning of Harris v. Reed.[4] Moreover, the number of cases in which the California Supreme Court has issued orders explaining that it considered various claims both denied on the merits and procedurally defaulted in one way or another is voluminous.[5]

At no time during the litigation of this case below did

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[4] See, e.g., the following cases, all citing Harris v. Reed, 489 U.S. 255 (1989): In re Clair, S045241; In re Pinholster, S034501; In re Davis, S045183; In re Hawkins, S039950; In re Frierson, S044946; In re Morris, S050354; In re Turner, S037488; In re Anderson, S047514; In re Bonin, S051633; In re Montiel, S033108; In re Mayfield, S050116; In re Stankewitz, S047669; In re Alcala, S047409; In re DeSantis, S051609; In re Boyde, S039855; In re Rodrigues, S043207; In re Williams, S053130; In re Webster, S053140.

[5] See, e.g., In re Allen, S031165; In re Hunter, S031076; In re Williams, S039285; In re Coleman, S025597; In re Murtishaw, S026455; In re Hernandez, S029520; In re Kimble, S025105; In re Hovey, S008414; In re Wade, S015158; In re Frank, S013949; In re Hamilton, S024477; In re Miranda, S028518; In re Bloom, S035229; In re Bacigalupo, S03738; In re Deere, S036482; In re Grant, S038643; In re Bean, S04082; In re Hayes, S03945; In re Adcox, S017293; In re Allison, S016415; In re Walker, S017679; In re Siripongs, S018140; In re Clair, S045241; In re Cain, S032447; In re Pinholster, S034501; In re Davis, S045183; In re Cummings, S044871; In re Fauber, S030753; In re Hawkins, S039950; In re Wharton, S042418; In re Morris, S050354; In re Turner, S037486; In re Turner, S034988; In re Edwards, S030742; In re Belmontes, S012093; In re Howard, S042592; In re Stanley, Crim. 25155.

the state contend that potential procedural defaults had not actually been waived in these cases upon which Morales relied. Amicus curiae should not be heard to so contend now.

III

DRACONIAN STATE PROCEDURAL RULES ARE NOT REQUIRED TO ENSURE THEIR CONSISTENT APPLICATION BY THE STATE COURTS

The final section of the brief of amicus curiae picks up the tired refrain that the only way California can escape its present "predicament" is for it to adopt draconian rules "that all claims with no exceptions must be filed by a fixed date." Brief of Amicus Curiae at 11. It is a particularly myopic view that admits of no alternatives in the wide expanse between "no rule" and "no exceptions."

Amicus curiae's in terrorem characterizations notwithstanding, there is nothing in either the Ninth Circuit's opinion or in the numerous district court decisions predating it that requires injustice in the service of adequacy and independence. State rules allowing for equitable exceptions satisfy the adequate and independent state ground doctrine

whenever "the state is scrupulous about treating particular reasons as 'sufficient' routinely and others as insufficient with equal regularity." Prihoda v. McCaughtry, 910 F.2d 1379 (7th Cir. 1990).

CONCLUSION

For the foregoing reasons, respondent Michael A. Morales respectfully submits that the motion of the Criminal Justice Legal Foundation for leave to appear amicus curiae be denied, or in the alternative, that its arguments should be rejected with a denial of the petition for writ of certiorari.

DATED: November 4, 1996

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within entitled action; my business address is: 1900 Avenue of the Stars, Suite 650, Los Angeles, California 90067-4486.

On the date indicated below, I served the foregoing document described as RESPONDENT'S OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND SUPPLEMENTAL BRIEF IN OPPOSITION on the interested parties in this action, by placing [ ] the original [X] a true copy thereof enclosed in sealed envelope(s), addressed as follows:

Daniel E. Lungren, Attorney General
Keith H. Borjon, Supervising Deputy Attorney General
300 South Spring Street
Los Angeles, California 90013

[X] (By Mail) I am "readily familiar" with this firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage hereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on November 4, 1996 at Los Angeles, California.

[ ] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Jennifer V. Ball

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Calderon v. Morales
U.S.S.C. No. 96-355
C & F File No. 60430

Dear Sirs:

Please find enclosed an original and 10 copies of Respondent's Opposition to Motion for Leave to File Brief Amicus Curiae; Supplemental Brief in Opposition in the above-referenced matter. Please note that on October 10, 1996, Respondent's Motion for Leave to Proceed in Forma Pauperis was filed with the Court.

We also enclose an additional copy of Respondent's Opposition together with a self-addressed, stamped envelope. We would be grateful if you would conform and return the copy to us in the enclosed envelope.

Should you have any questions regarding this matter, please do not hesitate to contact us.

Thank you for your assistance.

Sincerely,

Jennifer V. Ball
Legal Assistant

Enclosures